



**Mung'aru v Global Alliance for Africa (Cause 932 of 2017)  
[2024] KEELRC 971 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 971 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 932 OF 2017  
JK GAKERI, J  
APRIL 11, 2024**

**BETWEEN**

**JOHN GACHUNGA MUNG'ARU ..... CLAIMANT**

**AND**

**GLOBAL ALLIANCE FOR AFRICA ..... RESPONDENT**

**JUDGMENT**

1. The Claimant avers that he was employed by the Respondent on 1<sup>st</sup> September, 2010 as a Microfinance Program Officer at a monthly salary of Kshs.75,000/= and his duties were to evaluate clients for loans advanced by the Respondent, monitoring and follow up and submission of reports to the Executive Director, Operations Director and the Supervisor who was based in Kenya, Mr. Simon Kihiko Kimani.
2. It is the Claimant's case that on 8<sup>th</sup> October, 2014, the International Executive Director of the Respondent, Mr. Thomas J. Derdak gave him a termination letter of even date and demanded that he leaves the office premises.
3. It is the Claimant's case that the allegations made by the Respondent were false and he was not accorded an opportunity to be heard.
4. The Claimant prays for;
  - i. 12 months' salary Kshs.900,000/=.
  - ii. October salary Kshs.75,000/=.
  - iii. Salary in lieu of notice Kshs.75,000/=.



### **Respondent's case**

5. By its statement of defence dated 6<sup>th</sup> January, 2022, the Respondent admits that the Claimant was its employee as alleged effective 1<sup>st</sup> September, 2010 but denies that he was a diligent or hardworking employee.
6. It also admits that it dismissed the Claimant from employment on 8<sup>th</sup> October, 2014 for the reasons itemised by the termination letter but contradicts itself by denying the termination and averring that the Claimant resigned and deserted the workplace.
7. The Respondent denies that the Claimant was entitled to any dues.

### **Claimant's evidence**

8. The Claimant confirmed that his employment was terminated on 8<sup>th</sup> October, 2014 and he was given a termination letter both a physical copy and via email but did not file a copy in court.
9. He testified that in 2016 he was arrested and charged for stealing but was acquitted.
10. On cross-examination, the Claimant testified that he had no evidence of performance or incentive pay by the Respondent.
11. The witness admitted that he was claiming the salary for the entire month of October although he worked for only 8 days.
12. That he did not file a single report on the loans advanced and repaid by the Respondent's clients.
13. The witness confirmed that although Kelvin Mutinda was present when his employment was terminated, he did not call him as a witness.
14. He admitted that some of the Respondent's clients had outstanding loan balances and had defaulted. That members of his family who were in the targeted group qualified for loans.
15. On re-examination, the witness maintained that he was not accorded an opportunity to defend himself.

### **Respondent's evidence**

16. Although the Respondent filed a witness statement by one Dr. Thomas J. Dardek, it did not avail any evidence in support of its case against the Claimant and in particular the Investigative Audit Report by Kiage and Associates.
17. Worthy of note, although the Claimant testified and closed his case on 24<sup>th</sup> October, 2022 and the Respondent was accorded sufficient time to have its witness testify, it did not present the witness and the Respondent's case was closed on 23<sup>rd</sup> January, 2024.

### **Submissions**

18. By 20<sup>th</sup> February, 2024 when the court retired to prepare this judgment, none of the parties had filed submissions.

### **Findings and determination**

19. It is common ground that the Claimant was employed by the Respondent on 1<sup>st</sup> September, 2010 as a Micro Finance Program Officer at Kshs.75,000/= per month and his local supervisor was one Mr. Simon Kihiko Kimani.



20. It is also not in dispute that the Claimant's employment was terminated by the Respondent on 8<sup>th</sup> October, 2014 as admitted by the Respondent in paragraph 5 of the Statement of Defence.
21. However, the admission notwithstanding, the Respondent purports to contest the termination in paragraphs 7 and 11 of the Statement of Defense by alleging that the Claimant resigned from employment and voluntarily deserted the workplace.
22. Strangely, none of the parties furnished the court with a copy of the termination letter to enable it appreciate the reasons and circumstances in which the Claimant's employment was terminated.
23. The issues for determination are;
  - i. Whether termination of the Claimant's employment was unfair.
  - ii. Whether the Claimant is entitled to the reliefs sought.
24. As to whether termination of the Claimant's employment was unfair, the homeport are the provisions of the *Employment Act*, 2007 on termination of employment.
25. In summary, the provisions of Sections 41, 43, 44, 45 and 47(5) of the Act are clear that for a termination of employment to pass muster, the employer must have had a valid and fair reason to terminate the employment and must have done so in accordance with a fair procedure. The reason must relate to the employees conduct, capacity or compatibility or operational requirements of the employer.
26. The law imposes an onerous burden on the employer to prove the reason(s) for the termination as well as compliance with the prescribed procedure.
27. The burden of the employee is to prove that the termination of employment was unfair.
28. The foregoing was aptly captured by the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR as well as *Ndolo J. in Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR.

### **Reason for termination**

29. Section 43 of the *Employment Act*, 2007 provides that;
  1. "In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.
  2. The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee."
30. In that instant case, neither party adduced evidence on the reasons for termination. The Claimant avers that the reasons set out in the letter of termination were false and the Respondent by design or default did not adduce any scintilla of evidence to justify the termination of the Claimant's employment.
31. Without credible evidence that the Claimant was culpable for any for the eight (8) allegations made against him, as ordained by the provisions of Section 43 and 47(3) of the *Employment Act*, 2007, it is surmisable that the Respondent has failed to evidentiary prove that it had a valid and fair reason to terminate the Claimant's employment.



32. The fact that the Claimant was charged for stealing is not sufficient evidence that the Respondent had a reason(s) to terminate the Claimant's employment.
33. Equally, the Respondent tendered no evidence to show that the charge was established or if the case was still pending determination.

### **Procedure**

34. Although Section 45(2)(c) of the *Employment Act*, 2007 provides that it must be proved that the termination of employment was in accordance with a fair procedure, this provision does not set out the requirements of fairness in termination of employment.
35. The operative provisions are embodied in Section 41 of the *Employment Act*, 2007 and are mandatory for a termination to pass the procedural fairness test as held in *Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR*.
36. These requirements include notification of the charges, explanation of the grounds to the employee in the presence of a witness, entitlement of the employee to the presence of a witness of his choice or the shop floor representative and hearing and considering the representations made by the employee or the representative. (See *Postal Corporation of Kenya V Andrew K. Tanui (2019) eKLR*).
37. In the instance suit, it is the Claimant's case that he was not invited by the Respondent to substantiate the allegations made against him and was not accorded the opportunity to be heard before the letter of termination was issued on 8<sup>th</sup> October, 2014.
38. The Claimant's uncontroverted evidence is that on 8<sup>th</sup> October, 2014, he met Dr. Thomas J. Derdak while in the company of one Mr. Kelvin Mutinda, a colleague and two other persons who introduced themselves as police officers.
39. According to the Claimant, Dr. Thomas J. Derdak gave him the termination letter, asked for files and was shown, asked for the office keys and requested the Claimant to pick his personal items and leave the premises and not return.
40. The Respondent tendered no controverting evidence or explain the circumstances differently.
41. Taken in totality, the evidence availed by the Claimant reveal that termination of the Claimant's employment was not conducted in accordance with the provisions of the *Employment Act*, 2007 which rendered the termination unprocedural and thus unfair to the Claimant and the court so finds.

### **Whether the Claimant is entitled to the reliefs sought**

42. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to various reliefs in law.

### **Pay in lieu of notice**

43. Having found that the Claimant's employment was terminated on 8<sup>th</sup> October, 2014 vide the termination letter handed over by Dr. Thomas J. Derdak, it is clear that no notice of termination was given or pay in lieu of notice.
44. The Claimant is awarded one month's salary in lieu of notice Kshs.75,000/=.



## October salary

45. The Claimant testified that he is claiming the salary for the entire month of October although he worked for only 8 days and provided no justification for the additional salary which he did not earn.
46. Section 17 of the *Employment Act*, 2007 provides that;
1. “Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the Currency of Kenya –”
47. Clearly, the Claimant had not earned the entire month’s salary and it was not payable to him.
48. The Claimant is awarded salary for the 8 days in October 2014, Kshs.20,000/=.
- c. 12 months’ salary
49. Having found that termination of the Claimant’s employment by the Respondent was unfair, the Claimant is entitled to the relief provided by Section 49(1)(c) of the *Employment Act*, 2007.
50. In determining the quantum of compensation, the court has considered the fact that;
- i. The Claimant was an employee of the Respondent from 1<sup>st</sup> September, 2010 to 8<sup>th</sup> October, 2014, a duration of about 4 years and 1 month which is a fairly short time.
  - ii. The Claimant had no previously recorded warning letter or disciplinary matter.
  - iii. The Claimant did not express his wish to remain in the Respondent’s employment or appeal the Respondent’s decision.
51. In the circumstances, the equivalent of 2 months’ salary is fair.
52. In the upshot, judgment is entered in favour of the Claimant against the Respondent as follows;
- a. Salary in lieu of notice Kshs.75,000.00.
  - b. Salary for 8 days in October 2014 Kshs.20,000.00.
  - c. Equivalent of 2 months gross salary Kshs.150,000.00.
- Total Kshs.245,000.00

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11<sup>TH</sup> DAY OF APRIL 2024**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of



Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

